

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

4
5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
7)
8)

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND
10 THE HONORABLE JENNIFER C. BOAL
11

12 **MOTION HEARING**
13 **AND**
14 **STATUS CONFERENCE**
15

16 John Joseph Moakley United States Courthouse
17 Courtroom No. 12
18 One Courthouse Way
19 Boston, MA 02210

20 December 17, 2015
21 2:00 p.m.

22 Catherine A. Handel, RPR-CM, CRR
23 Official Court Reporter
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25 One Courthouse Way, Room 5205
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(Appearances continued on the next page.)

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on December 17, 2015.)

THE COURT: Please be seated.

COURTROOM DEPUTY CLERK URSO: This is In Re: New England Compounding, 13-MD-2419.

THE COURT: Good afternoon.

I think we will skip the introduction of counsel. Just tell me who you are before you begin to speak, and the same, of course, is true of those people on the telephone who wish to be heard.

Now, with respect to the agenda, the motion for oral argument as to which -- the motions as to which you wish to have a hearing today, there is first the motion for -- well, discovery has been done. So, I'll skip that altogether.

Then the other motions start with the plaintiffs' motion for partial summary judgment. Now, I note that the reply to the opposition to that motion is the same document as is the opposition to the defendant -- Tennessee defendants' motion for partial summary judgment. Now, does that mean that both of them are now ready for hearing, Mr. Stranch?

1 MR. STRANCH: Yes, your Honor, that's correct. If
2 you recall, at the last hearing we were discussing the timing
3 so that we could have it heard at this conference because
4 that's the way we agreed to brief it so that it could be heard
5 today.

6 THE COURT: I ask only because the Tennessee Clinic
7 Defendants' cross motion is listed, I thought, as still
8 briefing in progress.

9 MS. JOHNSON: And that's my mistake, your Honor.
10 That should have been similarly listed at the top with the
11 partial motion for summary judgment.

12 THE COURT: Well, you're all prepared. So, I'll be
13 glad to hear it. Now, who will argue?

14 MR. STRANCH: Mr. Nolan will argue.

15 THE COURT: Mr. Stranch for the plaintiffs?

16 MR. STRANCH: No. Mr. Nolan will argue.

17 THE COURT: Mr. Nolan.

18 MR. GIDEON: And, your Honor, C.J. Gideon on behalf
19 of the clinic defendants.

20 THE COURT: Just a second.

21 (Pause.)

22 THE COURT: There was an emergency motion tucked into
23 here for extension of time. If there is still a request for
24 extension of time, which I think is long past, that motion is
25 allowed.

1 And, otherwise, I think we are to the merits. Okay.

2 MR. NOLAN: Your Honor, George Nolan from Nashville.

3 I would like to tender to the Court some documents
4 that I'm going to refer to during my argument. I've given a
5 copy to my adversaries. So, we can do that now, and it
6 consists of some of the statutes that the Court will be
7 construing as well as the exhibits that we relied on in our
8 brief.

9 THE COURT: Is this designed to make sure that you
10 don't take much more than ten minutes on this?

11 MR. NOLAN: I think it will make things go more
12 quickly, your Honor.

13 THE COURT: That's good. Do you have enough copies
14 for the law clerks, at least to share one?

15 MR. NOLAN: Yes, your Honor. We have one for your
16 Honor, Magistrate Boal, as well as the law clerks.

17 THE COURT: So, Judge Boal and I will share one and
18 the law clerks, who are more numerous, will share one.

19 MR. NOLAN: Thank you, your Honor.

20 Your Honor, through this motion, the Tennessee
21 clinics ask the Court for a partial summary judgment that
22 contains two rulings: First, that the defendant Saint Thomas
23 Outpatient Neurosurgical Center was a seller or distributor of
24 the product that is the subject of this litigation.

25 THE COURT: What was it?

1 MR. NOLAN: The product was epidural steroid known
2 as --

3 THE COURT: No. I understand that. So, your
4 position is that they were a seller?

5 MR. NOLAN: Absolutely.

6 THE COURT: And were a seller directly to the patient
7 or to the doctor who owned half of them and injected it?

8 MR. NOLAN: It's our position, your Honor, that that
9 particular clinic sold the product to the patient. The
10 product was paid for by the patient's insurance company or in
11 some cases the government through Medicare, and it is
12 undisputed, and both sides agree, that the money that this
13 particular clinic received for these epidural steroid
14 injections did include compensation for the drugs that were
15 provided to the patients.

16 THE COURT: When I go to the hospital and they send
17 me home with a bunch of pills, are they sellers of the pills
18 to me?

19 MR. NOLAN: Yes, your Honor, if --

20 THE COURT: They are so treated by the law?

21 MR. NOLAN: Under Tennessee law they would be,
22 because under Tennessee law, the definition of a seller under
23 our Products Liability Act is very broad, and if we look at
24 the documents that I tendered to the Court, specifically,
25 under the first tab, we find how our products liability

1 statute defines the term "seller," and it -- "seller includes
2 a retailer or wholesaler or distributor and means any
3 individual or entity engaged in the business of selling a
4 product, whether such sale is for resale or for use or
5 consumption."

6 So, your Honor, here's what the undisputed facts in
7 the record show on that particular issue: There's no dispute
8 that the Saint Thomas Outpatient Neurosurgical Center is a
9 for-profit entity. There's no dispute that that entity does a
10 high-volume epidural steroid injection practice. That's 99
11 percent of what they do.

12 THE COURT: Excuse me one moment.

13 You said that the insurance paid for it. When the
14 patient got these injections --

15 MR. NOLAN: Yes.

16 THE COURT: -- which entity filed for the insurance
17 payment, either the Medicare or whatever supplementary
18 insurance?

19 MR. NOLAN: Your Honor, two entities filed for
20 payment. The first entity that filed for payment is the
21 Howell Allen Clinic, which is the neurosurgery group that owns
22 50 percent of the Saint Thomas Clinic, and the Howell Allen
23 Clinic sent a bill to Medicare or the insurance company for
24 the medical services of the doctor, Dr. Culclasure, who
25 actually administered the injections.

1 The second entity that sent a bill to a payor is the
2 clinic itself, the Saint Thomas Outpatient Neurosurgical
3 Center, and when that clinic sends a bill to Medicare, they
4 then receive money in exchange for the epidural steroid
5 injection that was provided to the patient and that money,
6 your Honor, does include payment for the drugs. We know that --

7 THE COURT: There was no bill from the defendant who
8 -- as to whom you seek partial summary judgment?

9 MR. NOLAN: No. There is a bill. We're seeking
10 partial summary judgment against the Saint Thomas Outpatient
11 Neurosurgical Center and the Saint Thomas Outpatient
12 Neurosurgical Center sends bills that don't include the
13 service of the doctor that gave the shot. That's billed
14 separately through a different organization.

15 The Saint Thomas Outpatient Neurosurgical Center
16 sends bills to Medicare. Those bills are typically \$1,034 for
17 an epidural steroid injection and that money does specifically
18 include payment for the drugs, and we know that's true and
19 undisputed because our adversaries admit that in their brief.

20 And, secondly, your Honor, if you look under Tab 8,
21 we find here a contract that is between this particular
22 clinic, Saint Thomas Outpatient Neurosurgical Center and Blue
23 Cross/Blue Shield of Tennessee, the largest health insurer in
24 Tennessee, and if you look under the purple tab, it indicates
25 what the global fee that that clinic charges encompasses, and

1 it specifically says the global fee also includes laser,
2 equipment, drugs, and facility charges. So, there's no
3 question that money changed hands in exchange for these
4 patients receiving these particular drugs.

5 And it's interesting to note, your Honor, that the
6 doctor who gives these injections is not paid on salary. He's
7 paid on commissions. In other words, he receives 60 percent
8 of the collections that he gets from giving these shots. So,
9 he's incentivized to spend less time with individual patients
10 and to give as many of these shots and to move as much of this
11 product as possible. So, it's our respectful position, your
12 Honor, that under the undisputed facts, a sales occurred.
13 That's also supported by the testimony.

14 If you look under Tab 7, your Honor, we have here an
15 excerpt from the deposition of Ms. Debra Schamberg. Now, who
16 is Debra Schamberg? Well, she's a party defendant. She is
17 the facility's director for the Saint Thomas Outpatient
18 Neurosurgical Center.

19 She was deposed and she was asked, quote: "And Saint
20 Thomas Neurosurgical provides epidural steroids to patients in
21 exchange for money, correct?"

22 Answer: "That is correct."

23 Question: "And it's a for-profit entity, Saint
24 Thomas Neurosurgical; is that correct?"

25 Answer: "That is correct."

1 Now, she could have said, but what she didn't say,
2 was: No, no, no, no, we don't -- we don't give steroids in
3 exchange for money. We provide a medical service. That's
4 what we do. We provide a service. We provide treatment. We
5 don't provide products, but that's not what she said. She
6 said they provide epidural steroids in exchange for money, and
7 that was a truthful answer, your Honor, because while we all
8 agree that there is a large degree of medical services
9 associated with administering this drug to patients,
10 nevertheless, the patients aren't there for acupuncture.
11 They're not there for the process of having a needle placed in
12 their back. They are there to receive medicine that is
13 designed to relieve pain and their insurance company pays for
14 it.

15 THE COURT: Are you saying, then, that the
16 neurosurgical entity gets paid both for the product, but also
17 gets paid for the service or does the doctor get paid for the
18 service and the entity for the product?

19 MR. NOLAN: What we're saying is that the doctor gets
20 paid separately for the medical service of administering the
21 shots.

22 THE COURT: And that's 60 percent of the total cost?

23 MR. NOLAN: And 60 percent of that money flow goes
24 into the doctor's pocket. That's what his compensation is for
25 giving those shots.

1 Separate and apart from that, a bill goes from the
2 clinic to Medicare or health insurance company, which includes
3 compensation for the drugs. It also includes, like, anything
4 else, overhead associated with providing that medicine to the
5 patient, but --

6 THE COURT: Is the 60 percent based on an agreement
7 between the doctor and the clinic or is that the way the
8 reimbursement by the insurance companies works?

9 MR. NOLAN: The 60 percent is the arrangement between
10 Dr. Culclasure and his employer, the Howell Allen Clinic. So,
11 he works for the neurosurgeons. The neurosurgeons refer
12 patients to this clinic that they own half of to get these
13 shots, and then the neurosurgery group, Howell Allen, sends
14 bills for Dr. Culclasure's services to Medicare and Dr.
15 Culclasure gets 60 percent of that revenue stream. That's the
16 way his compensation works. As far as the bill --

17 THE COURT: It's not necessarily related to the way
18 in which the reimbursement occurs?

19 MR. NOLAN: No. No. But we simply pointed out, your
20 Honor, that although my adversaries try to cast what they do
21 strictly as providing healthcare services and treatment for
22 the patient and they're not in the business of selling
23 products, according to them, their business arrangement
24 incentivizes the doctor to give less individual care to
25 patients and to give as many shots to as many patients in as

1 short a period as possible, but --

2 THE COURT: But I don't need to make findings as to
3 that.

4 MR. NOLAN: No, you don't. You don't need to make
5 findings as to that. The only thing that you need to
6 understand is that when this Saint Thomas Neurosurgical Clinic
7 sends a bill to Medicare and receives money for a particular
8 injection, that fee that they charge does include compensation
9 for the drugs.

10 So, that's our primary point, your Honor, and under
11 the undisputed facts, we suggest to the Court that the Court
12 should rule that this particular clinic is a seller.

13 Now, why is that so important? Well, under our
14 product liability statute, your Honor, generally speaking, a
15 seller can't be subject to strict product liability in tort.
16 That's the manufacturer's responsibility, but there's an
17 exception to that in our statute.

18 When a manufacturer is judicially declared insolvent,
19 under Tennessee law, then the seller or distributor is
20 required to stand behind the product. That's a very important
21 public policy decision made by our legislature. When a
22 product maker is defunct, the burden of loss does not fall
23 upon the innocent victims that played absolutely no role in
24 importing that product in Tennessee. The burden rests on the
25 sellers and distributors who participated in bringing that

1 product into the Tennessee market.

2 So, under our products liability statute, when a
3 product maker is defunct and a seller is required to stand
4 behind the product, then the doctrine of joint and several
5 liability applies. In other words, the seller is legally
6 responsible as the product maker would have been if the
7 product maker hadn't gone bankrupt for all harm caused by the
8 product. Now, that leads me --

9 THE COURT: There's no comparative fault here?

10 MR. NOLAN: There would be no comparative fault, and
11 that's under the Tennessee Supreme Court decision of *Owens vs.*
12 *Truckstops of America*, and what that decision held, your
13 Honor, is that when strict seller product liability applies,
14 the jury assigns fault attributable to the product in a single
15 unit and separate fault cannot be assigned to any of the other
16 players within the chain of distribution. So, any of the
17 other players that participated in making the product or
18 testing the product or marketing the product or designing the
19 product, cannot be on the Verdict Form because the fault
20 associated with the product for all harm caused by the product
21 is assigned as a single unit. Otherwise, you know, there
22 would be no benefit to having strict product liability.

23 THE COURT: And the liability falls only on the last
24 to sell to the injured plaintiff?

25 MR. NOLAN: That's right. In other words, the jury

1 assigns fault for all harm caused by the product, and then the
2 sellers or distributors are legally responsible to pay for the
3 harm attributed to the product. The claim is not focused at
4 all on the seller's decision making, whether the seller was
5 careful or careless. It's only about was the product
6 defective and did it cause harm to the patient and was this
7 particular -- did this particular entity sell it.

8 THE COURT: You mean to the --

9 MR. NOLAN: To what? Was this particular entity --
10 did it sell the product to the consumer, basically.

11 So, your Honor, that brings me to my adversaries'
12 cross motion for summary judgment. The basic premise of their
13 argument is that plaintiffs can't pursue products liability
14 claims against healthcare providers, because under the
15 Tennessee Healthcare Liability Act, that's the only remedy
16 that the plaintiffs have and, therefore, plaintiffs simply are
17 not allowed to prosecute strict products liability claims, but
18 if we look at the language of that statute, we can see that it
19 does not apply to our products liability claims.

20 Your Honor, if you look in your packet under Tab No.
21 4, that's the definition that is found in the Healthcare
22 Liability Act for what "healthcare services" means. There's a
23 lot of stuff in that definition, but one thing that's not
24 there is the word "product." It doesn't say anything about
25 products being covered under the Healthcare Liability Act.

1 Then if you look at Tab 5, your Honor, we find the
2 definition of a healthcare liability action that's within the
3 Healthcare Liability Act.

4 THE COURT: Well, under Tab 4 --

5 MR. NOLAN: Yes.

6 THE COURT: -- all that is -- the only liability --
7 or the only applicable conduct for liability is care, right?

8 MR. NOLAN: Care, that's right. Healthcare liability
9 claims are about --

10 THE COURT: Does that include surgery, for example?

11 MR. NOLAN: Surgery would be an example of care,
12 sure.

13 THE COURT: Does it include the use of mechanical
14 devices to assist the patient, for instance?

15 MR. NOLAN: If a claim asserts that the care was
16 negligent and that the mechanical device was inappropriately
17 inserted or used or selected by the surgeon, for example, that
18 would be governed by the Healthcare Liability Act, but under
19 the products liability --

20 THE COURT: Even though the patient gets charged for
21 this device separately from its insertion?

22 MR. NOLAN: Right. In other words, there could be a
23 circumstance, your Honor, in which a patient receives a
24 defective product that was sold by the healthcare provider and
25 the healthcare provider would face seller liability under our

1 products liability statute, but if the patient wants to impugn
2 the healthcare provider's decision making or care that was
3 rendered to the patient, that falls under the purview of the
4 Healthcare Liability Act, but if a patient asserts a claim
5 that is the product is defective, the manufacturer is now
6 defunct, the patient played no role in selecting that
7 manufacturer or selecting the product, even, then under
8 Tennessee products liability law, that burden falls on the
9 party that actually profited from the transaction and brought
10 the product into Tennessee.

11 So, your Honor, some of our claims, unquestionably,
12 are governed by the Healthcare Liability Act. Our claims that
13 criticize this clinic for choosing NECC as its steroid
14 provider of choice are governed by the Healthcare Liability
15 Act. No question about it. But our strict product liability
16 claim is not governed by the Healthcare Liability Act.

17 And, your Honor, if you look at -- if you look at --
18 under Tab 9 in your packet, this is two pages from the master
19 complaint, which are our products liability claim, and you'll
20 notice if you read that particular claim -- it's actually
21 three pages -- it doesn't talk about healthcare services. It
22 doesn't talk about the care that was rendered. It doesn't
23 even say the healthcare provider caused harm to a patient. It
24 says that the product caused harm.

25 And so, our strict products liability claims, your

1 Honor, have nothing to do with the conduct or the services
2 provided by the healthcare provider or the care. They are
3 only about the product.

4 So, what the defendants are asking this Court to do,
5 your Honor, is to construe the Healthcare Liability Act as
6 completely doing away with and preempting this important
7 provision of the Product Liability Act, but that's not the way
8 Tennessee law works as far as statutory construction is
9 concerned.

10 Your Honor, in our response brief, we point out two
11 fundamental tenets of statutory construction under Tennessee
12 law: The first tenet is that statutes, if at all possible,
13 should be construed by courts harmoniously. So, if there's a
14 way for a court to construe seemingly conflicting statutes in
15 harmony, that should be done.

16 Secondly, your Honor, our legislature codified a
17 principle of statutory construction, and it's cited in
18 Footnote 6 of our response brief, and in that codification, it
19 says that when there are two statutes that appear to
20 contravene each other, they should be construed so as the
21 matters following -- falling within the purview of each
22 statute are governed by that statute. That's exactly what
23 we're proposing the Court to do here.

24 Because the Healthcare Liability Act doesn't talk
25 about products and is only focused on services and care, that

1 act governs many of the plaintiffs' claims, but because
2 plaintiffs' strict product liability claims don't focus on the
3 care and services provided by these defendants but only focus
4 on harm caused by a product, those claims, your Honor, are
5 governed by the Product Liability Act.

6 THE COURT: I think you should conclude your
7 argument.

8 MR. NOLAN: Thank you.

9 MR. GIDEON: Your Honor, I'm C.J. Gideon on behalf of
10 STOPNC.

11 THE COURT: C.J.?

12 MR. GIDEON: C.J. Gideon, last name Gideon.

13 THE COURT: Okay.

14 MR. GIDEON: I represent Saint Thomas Outpatient
15 Neurosurgery Center, Howell Allen Clinic, also known as the
16 Tennessee Clinic Defendants.

17 If your Honor has any questions before I begin, I
18 would be pleased to answer them, but I've got about --

19 THE COURT: I prefer to interrupt.

20 MR. GIDEON: Well, that's fine, and I would ask you
21 to do so.

22 THE COURT: Not seriously, except I don't have any
23 questions right now.

24 MR. GIDEON: Okay.

25 I admire Mr. Nolan's ability to appear to be so

1 sincere and, yet, to be so wrong about the law in Tennessee.
2 As we pointed out in our brief, the recitation of the law, the
3 efforts to convince this Court to take this pathway to find
4 that the Tennessee Products Liability Act governs the
5 relationship between STOPNC and the plaintiffs is a pathway to
6 sure error.

7 The first point to be focused on is the Products
8 Liability Act does not apply even in the setting of an
9 insolvent manufacturer unless the other seller has another
10 feature. And what's that other feature? They have to be in
11 the business of selling products.

12 There is no showing that's been made to you at all.
13 There's been almost no reference to that point from Mr. Nolan,
14 and there is no evidence that STOPNC is in the business of
15 selling products.

16 Your Honor inquired based on past experience about
17 leaving a hospital and having them give you pills to take home
18 with you. I don't know what knowledge the Court has of an
19 epidural steroid injection, but it involves a long needle. It
20 involves a fluoroscope --

21 THE COURT: I have intimate acknowledge.

22 MR. GIDEON: Okay. Well, then you know that there is
23 more to it than just a vial of methylprednisolone acetate.
24 There is a fluoroscope. There is a radiologist. There is
25 normal saline, and everybody has got on gloves. There is a

1 fixed one-time fee for the entire service, including the
2 nurse, the recovery room, the gloves, the facility, the
3 license. Something else he didn't mention --

4 THE COURT: But does not the insurance company treat
5 it as separate pieces?

6 MR. GIDEON: No, ma'am, not in this case, and it's
7 been submitted to you many, many times. There is one global
8 bill on the Reed case and all the others that's one fixed fee
9 of \$1,034, of which Blue Cross/Blue Shield pays \$370. There
10 is no bill for methylprednisolone acetate.

11 And how can I say that with such conviction? Some of
12 these patients received two vials. There wasn't an upgrade
13 charge. There wasn't an additional charge. You couldn't call
14 STOPNC and say, I'd like to come by and pick up a vial, pick
15 up gloves and administer it myself.

16 The first and most important point here is that
17 STOPNC is not in the business of selling methylprednisolone
18 acetate, number one.

19 Number two, Mr. Nolan's argument that the crafty
20 lawyer can decide what law applies based on what you put in
21 your complaint was rejected unequivocally by the Tennessee
22 Supreme Court on October 8th, 2015 in the case of *Ellithorpe*
23 *vs. Weismark*. In that case there was a counselor handling a
24 very nasty -- well, handling the children of a very nasty
25 divorce. She was accused of not communicating with the

1 parents and, therefore, she was sued, and the plaintiff lawyer
2 said this isn't a malpractice case. This is not a psychiatric
3 or psychological malpractice case. This is a case where we're
4 saying she didn't do what the Court told her to do.

5 Well, the Tennessee Supreme Court on October 8th,
6 2015 said no matter how you characterize it, it's still
7 covered by the Healthcare Liability Act of 2011, which covers
8 all issues. It is the sum source and sum total of the law
9 that governs it, and that's the same point we're making here,
10 because this is clearly a transaction that is related to the
11 delivery of healthcare.

12 These patients as a group -- most of them had chronic
13 low-back pain. They were referred by a neurosurgeon to
14 STOPNC, and John Culclasure, an anesthesiologist M.D. by
15 training, injected methylprednisolone acetate into the
16 epidural space using fluoroscopy for guidance, and then they
17 were followed by nursing staff thereafter. It is
18 unequivocally related to the delivery of healthcare, and
19 that's when and where the Tennessee Healthcare Liability Act
20 applies, so says the Supreme Court on October 8th.

21 Third point, an area where Massachusetts and
22 Tennessee are similar, when you have a hybrid transaction, Mr.
23 Nolan says they can proceed on a products liability theory on
24 one hand and a malpractice theory on the other.

25 Tennessee and Massachusetts are the same, and the

1 answer to that is no. What the Court must do is look at the
2 predominance, what predominates. Is it services or is it
3 product? And if services predominate, then product liability
4 law does not apply, and we've briefed that at length.

5 And given that -- I'm sure your Honor is very
6 familiar with Massachusetts law on this point, but in the case
7 where there is a predominance of services, even if there is a
8 sale, which there wasn't here, the strict products liability
9 -- the UCC liability in Massachusetts does not apply.

10 The next thing I need to address is what I
11 respectfully submit is a fundamental problem with the
12 plaintiffs' position in this case. They say there is no
13 conflict in the law and that this Court need not make a choice
14 between the Tennessee Products Liability Act and the Tennessee
15 Healthcare Liability Act. That's just not true.

16 If you look at the sections of the law that state
17 what they apply to, you will find in succinctly the following:
18 The Tennessee Products Liability Act applies to every injury
19 caused by a product, no matter what you call the theory. The
20 Tennessee Healthcare Liability Act, on the other hand, says it
21 applies to every injury arising from healthcare services
22 provided by a healthcare provider which is related to
23 healthcare or healthcare that should have been provided.

24 There's a conflict in application of the two
25 statutes. They do overlap. And under Tennessee law, the more

1 recent statute governs, first of all; and, secondly, under the
2 predominance test, since this -- services clearly predominate
3 here, the Healthcare Liability Act must govern.

4 I respectfully disagree very much so with Mr. Nolan's
5 description of an opinion that even if all of you have
6 practiced law in Tennessee for many, many years, the *Owens vs.*
7 *Truckstops* opinion is one that leads many people to scratch
8 their head and wander away, read it again and get a different
9 feeling, but I will invite the Court to take a look at Page
10 433 of the opinion, which absolutely makes clear that what he
11 told you is wrong.

12 And that is, in that case they held that if the
13 third-party defendants charged with strict liability in tort
14 are also charged with negligence, as in our case, their
15 liability on the negligence claim will be several only.

16 So, it is not at all clear that *Owens* has any
17 application. Do you understand the circumstances? An
18 individual goes into a truckstop and falls off a stool. He
19 sues the truckstop. He does nothing about his case for two
20 years. The truckstop then files a third-party action against
21 the designer of the stool and the seller. They do nothing
22 about the case for three years. Then the law in Tennessee
23 changes in the *McIntyre* decision in 1992 when the Tennessee
24 Supreme Court wiped away contributory negligence and adopted
25 comparative fault.

1 At that stage the defendant asserts comparative fault
2 against the two entities that used to be in the third-party
3 action. The plaintiff says I'd like to do the same thing,
4 too. Barred by the statute of limitations.

5 So, the ultimate holding is that they're not going to
6 let the defendant assert comparative fault and they are going
7 to hold the defendant responsible for everything that may have
8 happened to a defective stool, but they're still going to let
9 him pursue a contribution action which had been eliminated by
10 the *McIntyre* decision. It's a transitional opinion that's out
11 on an island all by itself.

12 It also says that if this case occurred after the
13 adoption of comparative fault, the results would be different.
14 Well, these cases all occurred after the adoption of
15 comparative fault. *Owens* is of no use and of no help in
16 making the decision in this case.

17 Final point, *Owens* did not involve a healthcare
18 provider at all.

19 We ask you to decide the case in the following
20 fashion: That the claims in this case arise from or are
21 related to the delivery of healthcare, that the Tennessee
22 Healthcare Liability Act governs all these claims, that the
23 Products Liability Act of 1978 does not, that this Court will
24 follow the holding in *Ellithorpe vs. Weismark*, and, last, that
25 this Court will join the majority of the jurisdictions around

1 the country which hold that when a physician or an ambulatory
2 service provider, like STOPNC, is providing services,
3 including products as well, that the doctrine of strict
4 products liability does not apply. Who said that so far?
5 Restatement of Torts Third ALR, and 31 of the 33 states that
6 have considered this issue.

7 Now, do you have any questions, your Honor?

8 THE COURT: I don't think so.

9 MR. GIDEON: Thank you.

10 THE COURT: Crystal clear.

11 MR. GIDEON: Thank you.

12 THE COURT: And I will take the papers.

13 You don't have anything else, do you?

14 MR. NOLAN: A couple of brief points, if that's all
15 right.

16 THE COURT: You have to respond to the *Owens* case,
17 right?

18 MR. NOLAN: No. I just wanted to mention the
19 *Ellithorpe* case and that's the only case, and I also encourage
20 the Court to read that opinion carefully, because what it said
21 was that the Healthcare Liability Act applies to all claims
22 alleging healthcare providers caused an injury. We all agree
23 on that, but that's not what our product liability claims do.

24 THE COURT: Thank you.

25 MS. GREER: Your Honor, Marcy Greer for the Saint

1 Thomas Entities.

2 Just for the record, we have adopted and joined in
3 the argument of the Tennessee Clinic Defendants, all the
4 summary judgment materials, et cetera.

5 THE COURT: So, that's it, right?

6 MR. GIDEON: Judge Zobel, since we also filed a
7 motion, can I have 60 more seconds, please?

8 THE COURT: Is everybody agreed you can have 60 more
9 seconds?

10 MR. GIDEON: Or 75.

11 THE COURT: 60.

12 MR. NOLAN: No objection.

13 MR. GIDEON: 60.

14 The other thing I wanted to mention that I really
15 thought was astonishing in the PSC's briefs, one of the
16 arguments they make was there was no other law in Tennessee
17 that said at any time that the delivery of healthcare products
18 in conjunction with healthcare was anything other than a
19 service.

20 Well, that's just not true. I encourage the Court to
21 look at TCA 47-2-316, which has been on the books since 1967,
22 that says --

23 THE COURT: It's probably outdated.

24 MR. GIDEON: It's still good law. Still good law.

25 -- that says that a whole series of things that

1 involve finite products are not anything other than the
2 delivery of medical services, and that was an important
3 omission in the PSC's brief. I thank you.

4 THE COURT: Thank you very much.

5 Now, I think that's all we need to hear today, right?
6 Oh, no. There is the motion to strike the two cases that
7 disappeared.

8 MS. JOHNSON: That's correct, your Honor.

9 THE COURT: Are you arguing that?

10 MS. JOHNSON: I am not. That's actually Saint
11 Thomas' motion. They made it. I suggest they go first.

12 MS. GREER: Your Honor, Marcy Greer for the Saint
13 Thomas Entities, and this motion is also joined in by the
14 Tennessee Clinic Defendants.

15 Basically, the Court has spent a number of hours,
16 many, many months, lots of briefing developing a Bellwether
17 procedure. We've talked at length since we came in the case
18 three years ago about that process and making it fair and
19 balanced as well as representative.

20 THE COURT: Is the question in this case what Rule
21 41(a) means?

22 MS. GREER: Yes, sort of, but it's also what it means
23 in the context of a Bellwether setting where we have designed
24 this procedure, because what is effectively happening is that
25 if the PSC is allowed to dismiss these cases without

1 consequence, whether under a voluntary dismissal, a
2 stipulation or a -- well, stipulation would require our
3 consent, but -- or a motion from the Court, however it
4 happens, if they get a free range to do that, they're
5 effectively getting unlimited strikes, and right now we
6 started with 15 Bellwethers. There was one that was cross
7 designated. We have struck two of them. They've now pulled
8 down two more. If that's allowed to occur, we're down to
9 eleven plaintiffs and there's still six strikes to exercise.

10 And what's even more concerning to us is that the PSC
11 will get -- just continue to dismiss cases that they think
12 should not be in the Bellwether pool, and there are very
13 strong principles against that, because we don't have that
14 same ability. You know, we've moved to dismiss, but we have
15 to get a Court order, and they can dismiss at will under their
16 theory.

17 THE COURT: But that depends, does it not, on whether
18 or not there was an answer --

19 MS. GREER: Well, it doesn't --

20 THE COURT: -- or whether the answer that was filed
21 to the master complaint covers these cases?

22 MS. GREER: It does, in part, yes, your Honor, it
23 does, because -- and we have filed a master answer.

24 Let me take you back to how we got to the procedure
25 that we have with the master answer. We were the ones

1 advocating for a procedure that's used in most of these types
2 of cases, the MDLs, of one master complaint that applies to
3 the defendants and then short-form answer -- complaints that
4 can be answered with short-form answers in the individual
5 cases.

6 The PSC chose not to do that after the Court ordered
7 it. The PSC instead put all of their allegations against the
8 Saint Thomas Entities in the short-form complaints and then
9 adopted in most cases their long complaints, the individual
10 complaints from before. So, what we were faced with by virtue
11 of them following this unprecedented procedure --

12 THE COURT: No. I understand the history. I
13 understand the history. I'm just wondering what -- I'm trying
14 to understand the technical issue as to why these cases --
15 what should happen to these cases.

16 MS. GREER: Well, the --

17 THE COURT: You suggested either that I should order
18 they're dismissed with prejudice or -- I don't know exactly
19 what else you would like me to do.

20 MS. GREER: Or to treat them as strikes. The PSC
21 gets four strikes from the Bellwether pool, just like we do,
22 and if you were to require them to treat these as strikes as
23 opposed to just a pure voluntary dismissal without
24 consequence, that gets us closer to remedying the issue that
25 we're most concerned about.

1 THE COURT: Okay. I know you're agreeing. Mr.
2 Stranch.

3 MR. STRANCH: Your Honor, I've never seen a defendant
4 fight so hard to avoid a plaintiff giving up.

5 THE COURT: Yes, but are you giving up? I mean, if
6 it's not with prejudice, then the next thing that happens is
7 the Bellwether trials take place and then there are settlement
8 discussions and suddenly these plaintiffs want to be back in.

9 MR. STRANCH: Well, your Honor, let me give you a
10 little bit of history about these categories of cases.

11 Tennessee, as we know, has a one-year statute of
12 limitations. So, people have to file their cases within a
13 year, and at the time that that year was running, we didn't
14 truly appreciate the latency of the fungal meningitis. There
15 were still times in which people were developing fungal
16 meningitis and the fear was you may get a year and a half down
17 the road, develop fungal meningitis and then not be able to
18 bring your case.

19 THE COURT: What is the incubation period, or
20 whatever it's called? What is it called?

21 MR. STRANCH: The fungal meningitis?

22 THE COURT: Yes.

23 MR. STRANCH: The incubation period was initially
24 thought to be 180 -- was thought to be 90 days or less, and
25 then people started developing it 120, 180 days having

1 relapses. And so, they weren't really sure what it was and
2 that's --

3 THE COURT: Even now?

4 MR. STRANCH: I don't know that there's ever been
5 scientific consensus on exactly what it is, to be honest with
6 you, your Honor, but --

7 THE COURT: So, what's the consequence to these
8 plaintiffs who have now dismissed their cases?

9 MR. STRANCH: I mean -- your Honor, I'll be perfectly
10 frank with the Court. We don't represent them. They have
11 their own lawyers. We can't control whether they dismiss or
12 not, but we have a statute of repose in Tennessee that's three
13 years and we're outside of that. So, whether it's with
14 prejudice or without prejudice, it's going to be hard for them
15 to bring their case back, and I don't know what conversations
16 they had with their lawyers, but I would postulate to the
17 Court that what occurred was the lawyers sat down with them
18 and said, Here's your potential damages and here's what it's
19 going to cost to go to trial. And those people decided, You
20 know what? I'm not willing to do that, then.

21 And just so the Court knows, these aren't the only
22 two cases that have been voluntarily dismissed recently.
23 There's been additional cases, I believe seven or eight, that
24 are not Bellwethers that were also dismissed in the last month
25 or two, I presume for the same reasons, because there were

1 also people in that category six and seven that did not
2 develop fungal meningitis.

3 THE COURT: What's the plaintiffs' position as to the
4 possibility or the probability of these cases coming -- trying
5 to come alive again?

6 MR. STRANCH: I mean, I think -- I don't think
7 they're going to -- I mean, your Honor, I'm not going to say
8 never, but I don't see a way in which they could bring them
9 alive again, to be perfectly frank with the Court.

10 THE COURT: Well, if that's so, why not dismiss with
11 prejudice?

12 MR. STRANCH: Your Honor, I didn't file the notice of
13 voluntary dismissal. That was decided between those
14 plaintiffs and their lawyers and that's the way they did it.
15 You know, I did speak with the lawyer for them and he said if
16 it needs to be with prejudice, he's okay with that and so are
17 the clients. So, I really think it's much ado about nothing.

18 THE COURT: Okay.

19 MR. STRANCH: And --

20 THE COURT: And assume for the moment it is with
21 prejudice. Then does it also count as a strike?

22 MR. STRANCH: I do not believe it should, your Honor,
23 because the PSC didn't dismiss these cases. You know, this is
24 not something we did, you know. We didn't say -- we didn't
25 dismiss these cases. We don't have the authority to. You

1 know, we're just getting our cases ready for trial. This is
2 not like in the FEMA cases where all the discovery had already
3 been done and the case is going to be tried in a couple of
4 days and they try to voluntarily dismiss. I mean, this is
5 before any discovery was done case specific of these people.

6 THE COURT: Okay.

7 MS. GREER: Your Honor, the idea that the PSC doesn't
8 speak for these plaintiffs rings really hollow. We're talking
9 about an MDL where the PSC has been appointed for precisely
10 that purpose. For them to come in and say, Oh, we had nothing
11 to do with this and it shouldn't count against us is simply
12 not fair.

13 The Bellwether procedure is designed to deal with all
14 of the plaintiffs in this pool, and that is what we have been
15 operating under. That's what we've been trying to get to for
16 all this time and that's what the Court has ordered. And for
17 them to say, Oh, well, these people voluntarily dismissed
18 these cases, but there's no consequence to us, we're going to
19 start seeing every case where they think that they don't have
20 the best advantage get voluntarily dismissed, and it's going
21 to be blamed on people who are not before the Court,
22 supposedly. They brought their cases. They wanted to be in
23 the MDL, and they need to play by the rules. They should
24 be --

25 THE COURT: If they are dismissed with prejudice, is

1 there any reason why you couldn't nominate another case of the
2 same character?

3 MS. GREER: Well, we've only got 117 cases and we're
4 trying to get -- we got five different categories of injury.

5 THE COURT: So, the --

6 MS. GREER: The PSC wants to dismiss all of the fear
7 cases, the no-injury cases, and the ones where they're not
8 going to get big damages because they want to focus only on
9 the severe injury cases, which, you know, is certainly their
10 position, but the point is that's why we have the strikes, is
11 to avoid the outliers. They're going to keep getting these
12 cases voluntarily dismissed, and the point of having a pool is
13 to have a fair shot by each side to eliminate the outliers.

14 THE COURT: But I don't understand how you're harmed
15 if they are -- if these two cases are dismissed with prejudice
16 and you're entitled to nominate two more cases that are
17 exactly the same category.

18 MS. GREER: As long as it -- I mean, it's going to
19 keep going on, your Honor, is my concern.

20 THE COURT: Well, maybe. Maybe not.

21 MS. GREER: Well, perhaps, maybe that would be an
22 appropriate resolution here, would be to allow us to appoint
23 some additional cases.

24 THE COURT: Okay.

25 MS. GREER: But the Court would need to order that

1 any further dismissals from the Bellwether pool would count as
2 strikes, and that might be one way to remedy it, because,
3 otherwise, they're going to end up with unlimited numbers of
4 strikes to get all the cases they don't want tried out and get
5 to the number that they want.

6 THE COURT: But they get rid of all the fear cases
7 without having to pay a dime.

8 MS. GREER: That's 26 percent of the cases.

9 THE COURT: But why do you care? They're gone.

10 Anyhow, I will take the papers and think about it.
11 Thank you.

12 MR. STRANCH: Thank you, your Honor.

13 THE COURT: That takes care of all of the motions as
14 to which argument was sought.

15 There is one other motion that I think I allowed.
16 Premier Orthopedic and Sports Medicine motion to dismiss
17 product liability claims, and I believe I allowed that, and
18 the motion itself does not include the order that they want me
19 to sign. I couldn't find it. So, if an order is requested,
20 then could I, please, have the order and I will be happy to
21 sign it.

22 MR. WOLK: Judge, I'll be happy to file that tomorrow
23 for your Honor.

24 THE COURT: Any time. Any time.

25 MR. WOLK: Okay. So, then we can consider that --

1 THE COURT: I think it was allowed.

2 MR. WOLK: Okay. Yes, it was unopposed, your Honor,
3 and it had not been discussed at the previous conference.
4 That's why I requested it be put on the agenda. So, I'll send
5 in the order so your Honor can sign it.

6 THE COURT: Okay. Thank you.

7 MR. WOLK: Thank you, Judge.

8 THE COURT: Finally, there is a plaintiffs' motion,
9 Docket No. 2303, for leave to file exhibit under seal. I
10 don't know whether that's addressed to Judge Boal or to me,
11 but to the extent it's addressed to me, I only want to allow
12 it if the matters are really confidential and not just because
13 a lawyer says, Well, under our protective order, somebody
14 said, I don't want it public. So, if it's truly confidential,
15 then counsel could tell me that and I will allow sealing, but
16 we really want to keep sealing to an absolute minimum. That
17 is Docket No. 2303. I'm sorry, the other one was 2387.

18 MS. JOHNSON: Your Honor, I believe that 2303 was
19 part of the PSC's motion for partial summary judgment that you
20 just heard this morning.

21 THE COURT: Well, in that case, I'm not allowing it
22 until I get some kind of suggestion, at least, by counsel that
23 the document is, indeed, to be confidential and not just
24 because a lawyer under protective order could do it.

25 MR. STRANCH: Your Honor, we'll take a look at that.

1 We'll get with whoever designated it confidential and work it
2 out.

3 THE COURT: Thank you very much.

4 I think that's all I had, and we now go to -- Judge
5 Boal has dealt with Item A. I think we have dealt now with
6 Item B. And we now come to C, the report to the Court.

7 MS. JOHNSON: Yes, your Honor. Thank you.

8 Item No. 4, status of the bankruptcy. Mr. Gottfried
9 will provide that report.

10 MR. GOTTFRIED: Good afternoon, your Honor.

11 THE COURT: Good afternoon.

12 MR. GOTTFRIED: I have three things to report to the
13 Court. The first --

14 THE COURT: I hope they're good.

15 MR. GOTTFRIED: Say again.

16 THE COURT: I hope they're good.

17 MR. GOTTFRIED: They are good.

18 THE COURT: Terrific.

19 MR. GOTTFRIED: The first is that all allowed
20 unsecured claims have been paid.

21 THE COURT: Terrific.

22 MR. GOTTFRIED: Second, Judge Boroff held a hearing
23 yesterday on the post confirmation officer's first omnibus
24 objection to claims and those claims have been resolved as
25 requested by the post confirmation officer. There is an

1 additional couple of claims that will be heard on January 6th,
2 but the claim objections process is proceeding efficiently and
3 moving forward in a quick fashion.

4 And then, lastly, we are going to be announcing for
5 probably early to mid January an option to sell off the
6 equipment that's been left. And so, we will be in the process
7 of finalizing that as well. So, good progress is being made,
8 your Honor.

9 THE COURT: Thank you very much.

10 MS. JOHNSON: Item No. 5, the status of the insurance
11 declaratory judgment actions in the Specialty Surgery Center
12 cases. I understand that competing proposed certification
13 orders --

14 THE COURT: Excuse me one minute.

15 On my docket this is Item No. C(8), insurance
16 declaratory judgment.

17 MS. JOHNSON: If I could hand up to the Court -- we
18 filed --

19 THE COURT: I have a corrected one.

20 MS. JOHNSON: We have filed a corrected agenda. I
21 have copies, if I could hand that up.

22 THE COURT: Thank you.

23 (Attorney Johnson hands document to the Court.)

24 THE COURT: Okay. Sorry.

25 MS. JOHNSON: So, as to the Specialty Surgery Center

1 declaratory judgment action, the parties have filed competing
2 certification orders and that continues to progress.

3 No. 6, the status of discovery. Judge Boal has
4 issued a number of orders in the past month and we -- the
5 parties mentioned something this morning, but we are all very
6 appreciative of how much work and how quickly Judge Boal and
7 her staff has been able to turn things around here, and we
8 know that the schedule we've set would not be possible without
9 that. So, we very much appreciate it.

10 I don't think any of those particular orders warrant
11 discussing, given the proceedings that we had this morning,
12 your Honor, unless you wish to talk about any specifically.
13 Thank you.

14 MR. STRANCH: Judge Boal is going to do a victory lap.

15 MS. JOHNSON: Item 7, the status of the litigation
16 track. The 7(a), Mr. Sobol regrets that he was not able to
17 attend. So, I will give the report in his stead.

18 The report is simple. The Plaintiffs' Steering
19 Committee has solicited and collected time and expense records
20 from attorneys who wish to be considered for a common benefit
21 fee award. We are in the process of reviewing time and
22 conducting interviews of firms that have made those
23 submissions. We expect interviews will start and we hope
24 finish in January, and we would anticipate making a
25 recommendation or otherwise a report to the Court in the first

1 part of next year.

2 7(b), and this is really to simply alert the case to
3 an -- to alert the Court to an upcoming deadline. There is
4 currently a stay of discovery in place as to clinics that
5 have -- I believe the number is four or fewer cases against
6 them in the MDL, and that stay expires sometime in December, I
7 believe it's the 31st. The PSC intends to make a filing
8 asking the Court to extend that deadline.

9 I understand we're still speaking with some of the
10 counsel for particular clinics and we're hoping that we can do
11 something jointly or at least with some consensus behind it
12 and we anticipate making that, I would hope, this week and
13 maybe next.

14 THE COURT: Okay. It certainly would be nice if it
15 could be done by consensus.

16 MS. JOHNSON: Yes, we are trying.

17 7(c) Mr. Stranch will address.

18 MR. STRANCH: Thank you, your Honor.

19 MAGISTRATE JUDGE BOAL: Actually, I had a question
20 about (i), the motion for extension of common fact discovery
21 deadline applicable to cases naming Box Hill defendants to
22 March 25th. I know that was filed this week. Does the PSC
23 anticipate objecting to that?

24 MS. JOHNSON: My understanding, your Honor, is that
25 we do not anticipate objecting. I believe that was filed as

1 an unopposed motion, but I would prefer to speak -- confirm
2 that with counsel for the particular Box Hill plaintiffs, but
3 I would suggest to you that we can do that and let the Court
4 know within a day or two.

5 MAGISTRATE JUDGE BOAL: So, my next question is -- I
6 had, I think, earlier this month endorsed an order making the
7 Premier and Box Hill deadlines the same. So, should this
8 motion also apply to the Premier defendants?

9 MR. WOLK: That is one that we intended to at some
10 point join, your Honor, but because it was filed as a motion
11 to extend, then we had more time to do that --

12 MAGISTRATE JUDGE BOAL: I think you need to sit down.

13 MR. WOLK: I'm sorry.

14 That is a motion that we intended to join. I don't
15 think that the deadline for joining that or filing a reply to
16 that has come yet. So, we did intend to join that at some
17 point.

18 MAGISTRATE JUDGE BOAL: None of the deadlines have
19 expired. If I can rule on it next week or this week -- it
20 seemed to me that you were then going to ask to join it. So,
21 I'm asking you now whether you would like to join it.

22 MR. WOLK: And we would. Yes, we would, your Honor.

23 MR. KIRBY: And, your Honor, just to explain. The
24 motion explained itself that it was with the assent of the --

25 THE COURT: Can you please identify yourself.

1 MR. KIRBY: I'm sorry. Gregory Kirby on behalf of
2 the Box Hill defendants.

3 The motion itself that I filed was with the assent of
4 the plaintiffs in that case. So, there was no --

5 MAGISTRATE JUDGE BOAL: That's what was not clear to
6 me. It looked like it was specific to certain plaintiffs
7 rather than it had been assented to by the PSC.

8 MS. JOHNSON: To the extent there's any ambiguity,
9 the PSC assents to that extension.

10 MAGISTRATE JUDGE BOAL: And then you would also ask
11 on behalf of the Premier defendants for the same extension?

12 MR. WOLK: That's right. If I have to confer with
13 the PSC, I'll do that, unless your Honor is inclined to grant
14 that.

15 MAGISTRATE JUDGE BOAL: No, but I understood Ms.
16 Johnson to say you needed to check with counsel who is in
17 charge of the New Jersey cases. Did I understand that --

18 MS. JOHNSON: I think as a matter of diplomacy, I
19 should at least have a discussion.

20 MAGISTRATE JUDGE BOAL: All right. So, if I hear
21 nothing by next Monday, then I'll understand that I can grant it.

22 MS. JOHNSON: Excellent, your Honor.

23 MAGISTRATE JUDGE BOAL: And join in the Premier
24 defendants.

25 MR. WOLK: As to both. Okay. Thank you, your Honor.

1 MR. STRANCH: That brings us to the motion to amend
2 to add Calisher. As we discussed at the last status
3 conference, we filed that motion and Calisher was weighing
4 what they wanted to do. They've decided not to oppose that
5 motion and have not filed a response. So, it is ripe for
6 granting. And so, we would just ask that the Court go ahead
7 and grant that motion.

8 THE COURT: No opposition at all?

9 MR. STRANCH: No.

10 THE COURT: Okay. It's allowed. This is No. 2380,
11 is the motion, right?

12 MAGISTRATE JUDGE BOAL: Can I just ask for a
13 clarification? Which group does the Specialty Surgery Center
14 fall into?

15 MR. STRANCH: The Specialty Surgery Center is one of
16 the Tennessee clinics. It was the clinic on the Cumberland
17 Plateau in east Tennessee, and they are on a slightly
18 different time track. In fact, we filed a motion to try to
19 establish new dates for that because we're adding Calisher in.
20 We've also got the motion to compel that we'll discuss in a
21 little bit when it comes up relating to modification of
22 documents and not turning them over. We'll talk about that in
23 a minute.

24 MR. GIDEON: Judge Boal, Specialty Surgery Center
25 includes the names Jean Atkinson who was the Debbie Schamberg

1 there, Kenneth Lister who was the John Culclasure, and that is
2 the facility that is the subject of the declaratory judgment
3 action pending before Magistrate Brown and Chief Judge Sharp
4 in Nashville, the declaratory judgment action filed by State
5 Farm.

6 MAGISTRATE JUDGE BOAL: Thank you.

7 MR. STRANCH: And to be clear, none of the
8 Bellwethers come from the Specialty Surgery Center pool of
9 cases. They're all Saint Thomas cases.

10 THE COURT: Now, part (d).

11 MS. JOHNSON: That brings us to 7(d).

12 Since the last status conference, the PSC filed a
13 list of cases that had been self identified by plaintiffs'
14 counsel that name only settling defendants and for which it
15 would be appropriate for the Clerk to notate the dismissals.

16 We did have -- working with the Clerk, we submitted a
17 corrected version of that list. We believe that list to be
18 fully correct now and it will be appropriate -- I don't mean
19 to be telling the Clerk what to do. So, I don't mean in that
20 sense, but it would be appropriate that those cases be
21 dismissed at this point.

22 THE COURT: They're to be dismissed based on the fact
23 that the only people they sued have now settled and the cases
24 are, therefore, completed?

25 MS. JOHNSON: That is correct, your Honor.

1 THE COURT: So, it's, in essence -- is it a judgment
2 that we're entering, or what?

3 MS. JOHNSON: It is a judgment that you are entering
4 pursuant to the Court's earlier order implementing this
5 process, indicating that judgment would be entered for those
6 list of cases that were to be provided at a later date.

7 MAGISTRATE JUDGE BOAL: And if I could just ask -- I
8 know they're not here, but there was a motion by some of the
9 defendants in the criminal case to continue to participate in
10 discovery here based, in part, because they said the Court had
11 not entered judgment dismissing them from the MDL.

12 MS. JOHNSON: Correct.

13 MAGISTRATE JUDGE BOAL: So, does some order from the
14 Court in response to the list of cases that you've now filed
15 need to be entered before they are dismissed from the case?

16 MS. JOHNSON: So, we tried to deal with this in a
17 little bit of a backwards way. So, the Court entered the
18 order that the Court previously entered said -- asked the PSC
19 to provide a list of cases, and that earlier order said that
20 judgment would then be entered in that list of cases. So, I
21 believe the Court has already entered an order entering
22 judgment, and all that needs to be done now is to have the
23 Clerk notate that judgment has been entered in each of the
24 cases that appear on that list.

25 THE COURT: So, simply a judgment dismissing the

1 case?

2 MS. JOHNSON: That's correct. And it is a -- it is
3 truly, your Honor, at this point in time, your Honors,
4 procedural in that the Court has already dismissed all of the
5 claims against these defendants. So, now this is the
6 important but somewhat ministerial work of correcting the
7 dockets.

8 THE COURT: Do you know -- the list that you filed on
9 the corrected list, do they have docket numbers?

10 MS. JOHNSON: They do, your Honor, yes, individual
11 civil action numbers for each case.

12 THE COURT: So, the 2450 is the list -- includes the
13 list?

14 MS. JOHNSON: Yes, your Honor.

15 THE COURT: Okay.

16 MS. JOHNSON: The list may be 2450-1. I can't
17 remember, but it's associated with that entry.

18 THE COURT: Okay. Thank you.

19 MS. JOHNSON: No. 8 is inadvertently included from
20 last time. We talked about the Michigan proceedings last
21 time. So, there's no further update there.

22 No. 9. Ms. Martin asked that I apologize to the
23 Court. She had to leave in order to make another engagement,
24 but she wanted me to inform the Court that there was no
25 additional pro se activity this month.

1 THE COURT: Thank you.

2 MS. JOHNSON: On No. 10, in terms of scheduling. We
3 discussed with Judge Boal this morning that I believe the --
4 January 14th Judge Boal will also hold a hearing after the
5 status conference following the status conference, instead of
6 separately on January 15th.

7 THE COURT: So, January 15th is out?

8 MS. JOHNSON: Correct. I'm sorry, that's not really
9 my place to say, your Honor, but I believe that's what you
10 said.

11 MAGISTRATE JUDGE BOAL: You're accurately reporting
12 what took place this morning.

13 MS. JOHNSON: Thank you.

14 And in terms of the February 11th, we also talked
15 about Judge Boal holding her hearing following the status
16 conference that day as well.

17 THE COURT: Instead of at 11:30?

18 MAGISTRATE JUDGE BOAL: Yes.

19 MS. JOHNSON: And while this does not say it --

20 THE COURT: Do we have a hearing at 2 o'clock on that
21 day?

22 COURTROOM DEPUTY CLERK URSO: Yes.

23 THE COURT: February 11th?

24 COURTROOM DEPUTY CLERK URSO: Yes.

25 THE COURT: Okay.

1 MS. JOHNSON: And could we request a March date?

2 COURTROOM DEPUTY CLERK URSO: Do we have a date in
3 mind?

4 MS. JOHNSON: I would suggest March 10th.

5 COURTROOM DEPUTY CLERK URSO: Sure. I'll rearrange
6 the schedule. I'll switch something over that we have on.
7 So, March 10th, at 2:00.

8 THE COURT: Okay. And, again, the same, Judge Boal
9 in the morning and this in the afternoon or are we permanently
10 going to 2 o'clock to be followed?

11 MS. JOHNSON: I would suggest that's -- the parties
12 can make it work to Judge Boal's discretion.

13 THE COURT: It's up to you.

14 MAGISTRATE JUDGE BOAL: I'm available as of now both
15 the morning and the afternoon. So, I don't -- I think it
16 sometimes depends on the volume. So, it's probably safer for
17 us to put -- I'm not encouraging volume, but if we put it at
18 11:30, it gives us enough time, I suppose, to deal with
19 everything.

20 MS. JOHNSON: Thank you, your Honor.

21 That then brings us to fully-briefed motions, and
22 while I don't think we need to address all of these, I did
23 want to address No. 11 with the Court's permission. I believe
24 this would be addressed to Judge Boal.

25 The PSC has not filed a formal response, but we did

1 want to share with the Court our perspective on this issue,
2 which is that, from our perspective, the protective order and
3 the deposition protocol do not permit non-parties to
4 participate in depositions where confidential or otherwise
5 protected information is used.

6 It's very clear to the PSC that the Insiders and NECC
7 and the affiliated defendants are no longer parties in this
8 litigation. Certainly, not in any meaningful way. There may
9 be a procedural quirk they're still on the docket as a party
10 because a particular civil action has not yet been dismissed,
11 but as all the claims against them have been dismissed,
12 they're not really parties and certainly not in the ordinary
13 sense.

14 From the PSC's perspective, it's a distraction to
15 have additional participants in these depositions, and I don't
16 say that in any way to malign their counsel or suggest they've
17 not been behaving appropriately. It's simply additional
18 bodies and additional people participating and, particularly,
19 in terms of scheduling and things like that, it's just -- it's
20 a bit of a distraction.

21 THE COURT: Are they participating or are they simply
22 sitting in?

23 MS. JOHNSON: My understanding is that they are
24 participating largely by telephone. They're listening.
25 They're not -- and anyone in this courtroom who knows

1 otherwise should speak up.

2 MR. STEIN: I'm sorry, your Honor. Cal Stein
3 representing Barry Cadden. I'm colleagues with Michelle
4 Peirce who filed the motion. If I may.

5 Yes, we are just --

6 MR. ELLIS: Come to a microphone.

7 MR. STEIN: I'm sorry.

8 THE COURT: You can go in the witness box. There's a
9 mic in the witness box. All you got to do is turn it on.

10 COURTROOM DEPUTY CLERK URSO: It's on, Judge.

11 MR. STEIN: Can you hear me?

12 THE COURT: You can even sit down.

13 (Discussion off the record.)

14 MR. STEIN: This is a spot I've never sat in.

15 THE COURT: Lucky you.

16 MR. ELLIS: You're fortunate.

17 MR. STEIN: Do we have it now?

18 THE COURT: Yes. Perfect.

19 MR. STEIN: Yes, your Honor. We are just looking to
20 be able to log in remotely and continue to watch and listen to
21 the depositions and get transcripts, as we have been all
22 along. We are not looking to participate, show up at the
23 locations of the depositions or ask any questions.

24 MAGISTRATE JUDGE BOAL: Thank you.

25 THE COURT: Okay. You're welcome to stay there if

1 you want.

2 MR. STEIN: Then I will. Thank you.

3 MR. SCHRAMEK: Your Honor, Adam Schramek for the
4 Saint Thomas Entities.

5 I've been involved in this with respect to the issue
6 of the criminal defendants' attorneys reaching out to me
7 asking for call-in information and not knowing whether they're
8 a party, they're not a party, what should I do.

9 So, just from a practical point of view, we filed a
10 response saying we really don't care if they listen in or not
11 so long as -- and this is a very important qualification -- so
12 long as that is not going to be some basis for denying us
13 discovery in the future, because the government has taken the
14 position that they didn't want the criminal defendants
15 participating in the MDL. So, they knew that the depositions
16 -- and, again, from our position, we don't care if they're
17 there or not, but that can't be used as a reason that we can't
18 get the evidence we need, which really includes two key
19 witnesses, Joe Connolly and John Notarianni, which are very
20 important for us to get, your Honor.

21 MAGISTRATE JUDGE BOAL: Thank you.

22 MS. JOHNSON: And I don't want to further complicate
23 this issue, your Honor. So, I apologize sort of for bringing
24 this up, but there are documents in the repository and that
25 are, at least potentially, being used at these deposition that

1 were produced by non-parties, third parties or parties who are
2 not present before the Court today and they were produced
3 under the terms of a protective order and a deposition
4 protocol. So, I'm loath to suggest that we need to solicit
5 input from people who really may have no fight in this game,
6 but just to make the Court aware of that.

7 MAGISTRATE JUDGE BOAL: Thank you.

8 MS. JOHNSON: I believe that brings us to No. 12,
9 which we have not requested argument for, but there is a
10 motion to certify for interlocutory appeal pending before the
11 Court.

12 THE COURT: That's ready to decide?

13 MS. JOHNSON: Yes, your Honor.

14 THE COURT: Okay.

15 MS. JOHNSON: No. 13, the Court has already indicated
16 it has been allowed, and Mr. Wolk says that he will provide a
17 proposed order.

18 And No. 14 is simply an enumeration of the choice of
19 law briefing previously filed. There's nothing new there.

20 THE COURT: Yes.

21 MS. JOHNSON: On the briefing in progress...

22 (Discussion off the record.)

23 MR. STRANCH: First, your Honor, for No. 15, the
24 emergency motion, I understand Judge Boal dealt with that this
25 morning. So, that's taken care of.

1 As to No. 16, this is the motion that we mentioned
2 before where we discovered that the drug formulary had been
3 modified in April of 2013 to include on it the DepoMedrol that
4 was used in this case. Previously it was not on the drug
5 formulary and, according to the terms of the formulary, if
6 it's not there, you're not supposed to be using it.

7 That document was not turned over to us in the
8 original document production. We only got it through Calisher
9 as a third party because they had some emails where they made
10 the changes to the document. So, that's a motion to compel
11 that we have pending and asking for the Tennessee defendant --
12 the Specialty Surgery defendant to (A) produce two witnesses
13 for a re-deposition who testified that that was in effect in
14 2012 when it wasn't.

15 MAGISTRATE JUDGE BOAL: Well, I don't think -- they
16 haven't responded yet. So, I'll put it on if it's fully
17 briefed for the next time.

18 MR. STRANCH: Okay. Thank you.

19 MS. JOHNSON: That brings us, then, to a series of
20 motions where defendants are requesting access to the Rust/
21 Omni repository which houses qualified protected health
22 information or other health information protected by state
23 statute.

24 The PSC, as we discussed this morning, does not
25 substantively object to the request for access. There are a

1 few details we need to work out in terms of who can access
2 what materials, but as we discussed with Judge Boal this
3 morning, we are going to -- all the parties that have filed
4 motions will sit down with the PSC and we'll try to submit a
5 jointly-proposed order.

6 And then as to the dispositive motions, I would only
7 note that 25 is the motion that your Honor referred to earlier
8 that really was part of what we heard this morning, as is 28.
9 Otherwise, that's it.

10 THE COURT: Does anyone have anything else?

11 (No response.)

12 THE COURT: Well, I wish you all a happy holiday and
13 -- oh, yes, Mr. Gideon.

14 MR. GIDEON: Yes, ma'am. I would like to ask the --

15 THE COURT: Mr. Gideon's trumpet is coming up.

16 MR. GIDEON: Pardon me?

17 THE COURT: Mr. Gideon's trumpet.

18 MR. GIDEON: Yes. Yes. In fact, my name is Clarence
19 Gideon. When I was young I asked my dad, also Clarence
20 Gideon, when I heard on the news a story about Gideon versus
21 Wainwright, I said, Is that a relative of ours? And my dad
22 said, No, no, no, no.

23 I don't know how to put this before the Court, but --
24 and I'm directing this to Judge Boal because it's a discovery
25 issue, but using the Massachusetts Board of Registration and

1 Pharmacy deposition as an example, counsel for the nonparty
2 criminal defendants, the Insiders, were seeking to be
3 included. The Assistant U.S. Attorneys have been telling us
4 that one of the reasons they're opposing our efforts to take
5 depositions is because they can get access to information to
6 use at the trial.

7 We're going to need some guidance in terms of how to
8 handle this concretely. The current order which we're
9 observing, everybody understands the deposition is
10 confidential for 30 days, but I'm, frankly, at a loss to know
11 whether we are permitted to vary from the notification process
12 to everyone who has ever been a party prospectively. If an
13 order is entered dismissing all these claims against these
14 individuals, does that process then change? Do we no longer
15 have to notify them, no longer have to give them access by
16 telephone to the depositions or not? I don't think it's our
17 prerogative to just say, Well, we're not going to let you do
18 that because the AUSA doesn't want us to. So, we need some
19 guidance so that we're not fighting this out with individuals
20 before each of these prospective depositions, which includes
21 depositions of experts coming up between now and February 19th.

22 THE COURT: Is this matter before the Court -- before
23 either Judge Boal or before me in some formal way?

24 MR. GIDEON: That's why I was asking, your Honor.
25 Should we submit a motion for clarification of the pending MDL

1 order?

2 THE COURT: Well, whatever you title the motion, if
3 you want some relief from a problem, you got to tell us what
4 the problem is.

5 MR. GIDEON: Okay. All right. We'll do it.

6 MR. STEIN: Your Honor, excuse me. I think this is
7 the same issue that's before the Court with respect to Barry
8 Cadden's motion to continue to attend the depositions in --

9 MAGISTRATE JUDGE BOAL: I haven't read it today, but
10 my recollection is it's just a motion to attend the
11 depositions. It doesn't necessarily deal with all the
12 collateral issues that Mr. Gideon has now raised about what's
13 to happen with deposition transcripts or things that might be
14 protected -- otherwise protected.

15 MR. GIDEON: Correct. And currently we're in this
16 no-man's zone where after 30 days, I don't know what the
17 status of that transcript is. I know it's confidential for
18 30, but I don't know who has access to it prospectively, and I
19 don't want to be in a position where the AUSA tells us that by
20 virtue of failing to control access to the discovery, we have
21 affected a fair trial in this venue.

22 MAGISTRATE JUDGE BOAL: Well, I agree absolutely with
23 Judge Zobel. I'm not comfortable ruling on things on the fly.
24 I prefer to have documents that are filed that everybody can
25 comment on. Obviously, if you all can agree on a proposed

1 amendment to whatever protocol we're talking about -- if you
2 think I need to stay the dissemination of depositions until we
3 work out a protocol, I'm obviously happy to entertain that
4 type of motion as well. Certainly, I don't think you all
5 should be put in -- you're trying to litigate your own case,
6 right, and you don't want to get dragged into other people's
7 battles, but it is all very sensitive and it's very
8 complicated. So, I would prefer to proceed on a written
9 motion.

10 MR. GIDEON: Well, we will, at least from our
11 client's standpoint, respond to the Cadden motion
12 substantively and ask for guidance, and we join with Mr.
13 Schramek. We don't care one way or the other, but we want
14 clear rules of the road as to what we're supposed to do.

15 THE COURT: Well, include in your motion, please, a
16 proposed order.

17 MR. GIDEON: We will.

18 MAGISTRATE JUDGE BOAL: Yes.

19 MR. GIDEON: Thank you.

20 THE COURT: I have one question that was raised by
21 No. 28. Is there actually a motion to stay decision on the
22 motions that I just heard this afternoon?

23 MR. GIDEON: Yes. And it's only to bring to your
24 attention that in the declaratory judgment case you were told
25 about a few minutes ago that's pending in Nashville, State

1 Farm versus Specialty Surgery --

2 THE COURT: Pending a decision by the Supreme Court
3 of Tennessee?

4 MR. GIDEON: Yes. Judge Kevin Sharp, the Senior
5 Judge in Nashville, has ordered that the questions be
6 certified to the Tennessee Supreme Court. Competing orders
7 were submitted on December 3rd, and we ask you in your
8 discretion to wait and see what they say, and that's the
9 motion.

10 THE COURT: Now, is there opposition to that motion
11 to stay?

12 MR. STRANCH: Yes, there is, your Honor. We'll be
13 filing our opposition to it.

14 THE COURT: Okay. So, I wait for opposition.
15 Anything else?

16 MR. GIDEON: No, your Honor.

17 THE COURT: Well, thank you all again. I'm sorry, I
18 just suddenly saw this.

19 MR. GIDEON: Thank you.

20 MS. JOHNSON: Thank you, your Honor.

21 MR. WOLK: Thank you, your Honor.

22 MR. NOLAN: Thank you.

23 THE COURT: Court is in recess.

24 (Adjourned, 3:20 p.m.)
25

C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 59, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Multidistrict Litigation No. 13-02419-RWZ, In Re: New England Compounding Pharmacy Cases Litigation.

December 27, 2015
Date

/s/Catherine A. Handel
Catherine A. Handel, RPR-CM, CRR